No. 93-1603

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF CLEARWATER, FLORIDA, *et al.*,

Petitioners,

—v.—

CHURCH OF SCIENTOLOGY FLAG SERVICE ORGANIZATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Respondent Church of Scientology Flag Service Organization, Inc. has no parent companies or subsidiaries to list pursuant to Rule 29.1 of the Rules of the Supreme Court.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Church of Scientology Flag Service Organization (the "Church") files this brief in opposition to the petition of the City of Clearwater and several City officials (collectively the "City") for a writ of certiorari. The opinion of the court of appeals is consistent with the decisions of this Court and of other circuits, and with the statute and legislative history. The City's petition presents no conflict among the circuits or with the decisions of this Court, and no new issue of law; it is merely an attempt to relitigate facts that already are clearly established in the record. Because, as the court of appeals held, the facts sufficiently establish the Church's entitlement to attorneys' fees, certiorari should be denied.

OPINIONS BELOW

The petition fails to mention or append the unreported decision of the district court, dated March 28, 1984, holding Clearwater Ordinance 3091-83 (the "1983 ordinance") unconstitutional (A-1).[1] The earlier decision of the United States Court of Appeals for the Eleventh Circuit, dated November 13, 1985, vacating the district court's decision of March 28, 1984 as moot, is reported at 777 F.2d 598.

STATEMENT

Proceedings Below

1. On October 6, 1983, the City enacted the 1983 ordinance (R1-1-29). The ordinance regulated charitable solicitations, even by churches and even on their own property, gave broad investigative powers to City officials, and imposed extensive recordkeeping and disclosure requirements. The 1983 ordinance exempted organizations that solicit from "members," defined as "any person regularly attending or participating in a charitable organization." Section 100.01(5). To be eligible for

[1] We have appended the missing decision. References to "A-___" are to pages in the appendix to this Brief in Opposition. References to "___a" are to pages in the appendix to the petition. Record references are made to the record in the court of appeals as follows: "R[volume]-[document number]-[page]," unless otherwise noted.

exemption, the 1983 ordinance required organizations, including churches, to record and disclose the names of members.

The 1983 ordinance required churches and charitable groups to obtain a city permit to solicit funds, imposed criminal and civil penalties for solicitation without a permit, and authorized post–denial judicial review of a decision denying a permit application. It also established a series of prohibited acts, for which criminal penalties were provided, and granted discretion to the City Attorney to investigate a charitable organization upon receipt of ten citizen complaints.

2. On January 23, 1984, the Church commenced this action to enjoin enforcement of the 1983 ordinance. The Church alleged that the ordinance violated the First Amendment religion clauses in a variety of ways, including, *inter alia*, (1) that it was enacted for an invidious sectarian purpose, to subject the Church to discriminatory regulation and to drive it from Clearwater; (2) that it improperly required churches and other organizations to disclose all their financial records and thus all their activities on a continuing basis; (3) that the permit requirement effected a prior restraint on speech, including religious speech, by forbidding churches to solicit funds even on their premises without first obtaining a permit; and (4) that it vested broad enforcement discretion in City officials without sufficient standards to cabin their actions. Finally, and most prominently, the Church alleged that the limited membership exemption effected a facial sectarian discrimination or denominational preference by extending the exemption only to those denominations whose members "regularly attend" services at which donations are solicited; churches, such as the Church of Scientology (and probably no other church in Clearwater) which provide religious services on an individual basis to members on an irregular or episodic schedule could not qualify for the exemption.

The Church moved for injunctive relief, placing particular emphasis on the discriminatory and intrusive nature of the membership exemption and on the broad discretion of the City Attorney to carry out a prior restraint against solicitation. Indeed, the Church characterized the membership definition as the "most important" facially discriminatory feature of the 1983 ordinance (R1-17-6) and decried the utter lack of stan-

dards to govern the actions of the City Attorney (R1-17-28 to 31).[2]

3. Six days after the oral argument, on March 15, 1984, the City repealed the 1983 ordinance and enacted Ordinance No. 3479-84 (the "1984 ordinance"), an amended version of the 1983 ordinance. While the 1984 ordinance contained numerous constitutional infirmities (as held by the court of appeals in a decision which is the subject of the petition in No. 93-1604), it did eliminate or ameliorate four of the critical defects raised by the Church. First, it eliminated the limited membership exemption, which facially discriminated against the Church. Second, it corrected the prior restraint of the 1983 ordinance by providing that an organization could continue to engage in solicitation even if it were denied a permit, unless and until the city obtained a court order enforcing its denial of a permit. Third, it restricted the unbridled discretion of the City Attorney, thereby making it more difficult for him to single out the Church for harsh enforcement. Fourth, it corrected certain of the vague provisions of the ordinance.

The City announced the change in a post-hearing memorandum submitted to the district court on March 16, 1984, in which the City conceded the unconstitutionality of the 1983 ordinance—a fact the City omits to mention anywhere in its present Petition. The City explained the repeal of the 1983 ordinance in terms substantially at variance with the City's current explanation:

> [The City] amended the subject ordinance in response to many of the objections asserted by the plaintiffs in their complaints and their pretrial memoranda of law. City recognizes a responsibility to draft the ordinance narrowly to achieve its purpose, and the City believes that the amended ordinance better satisfies this requirement.

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[2] Thus, petitioners' argument (Pet. at 12-14) that the Church, in its brief to the Eleventh Circuit, mischaracterized its initial constitutional attack on the 1983 ordinance—indeed, that it engaged in a "remarkable *volte face*" (*id.* at 13)—is false. While the Church indeed did complain about the intrusive and entangling nature of the 1983 ordinance, its focus was the very features of the ordinance that the City amended, in the face of that attack. *See* text, *post*.

(R1-20-2). The City's counsel repeated this concession in a status conference on March 23, 1984:

> Well, Your Honor, you know we passed an ordinance that these plaintiffs didn't like and they told us and they told the Court why they didn't like it. . . . Okay, and we took a look at why they didn't like it and we said, well, maybe they have got some valid objections to it, both in terms of how the Court might react to it and in terms of how the City legislatively would want to react to the objections we consider to be valid, we retrofied. . . . In other words, they wanted the Court to strike down those provisions. We have given them what they asked for. . . . [W]e felt we were doing the plaintiffs a favor and was not inconveniencing the Court by yielding to their objections and by adopting a new and different Ordinance to which, apparently and hopefully, they will have no objections.

(R2-46-3 to 4).

4. Shortly after the repeal of the 1983 ordinance, the district court held that the 1983 ordinance was unconstitutional on its face (A-1). With respect to the limited membership exemption, the district court stated that the 1983 ordinance:

> exempts those churches which limit their solicitations to those who regularly attend or participate in religious services (Section 100.01(5)). Churches which obtain contributions from members who participate in church services on a non–regular or episodic basis, as well as churches which do not offer, encourage, or require regular attendance or regular participation of their members are *not* exempt. Thus, a stable church membership requiring regular attendance need not be affected by this ordinance; however, a church whose membership is growing and actively engaged in proselytizing and fund raising falls under the regulatory scheme of the ordinance.

(A-16, A-17). The court found:

> There is absolutely no showing of any compelling state interest being furthered by the parameters of the limited membership exemption of this ordinance. This ordinance

> not only implies a religious preference, its mere presence could foster a stagnation of religious practice in Clearwater by impacting on growing congregations and forestalling larger, more organized churches from continuing to seek new members as well.

(A-17, A-18).

The district court also specifically addressed the issue of prior restraint, and the constitutional imperative to have adequate judicial review procedures available "to insure that decisions made by administrators do not effectively forestall First Amendment activities which should be allowed" (A-14). And, directing its attention to the discretionary powers to investigate possible violations and enforce the ordinance, the district court found these provisions constitutionally defective as well:

> The enforcement provisions of the ordinance do not contain articulated standards indicating when the City Attorney should or will investigate an organization against which ten complaints have been filed. This vagueness in determining when the City Attorney will conduct an investigation when ten complaints have been filed against an organization creates an opportunity for arbitrary and subjective enforcement of a law infringing on constitutional rights, and accordingly, is unconstitutional.

(A-20).

On appeal, the United States Court of Appeals for the Eleventh Circuit vacated the district court's ruling as moot, since at the time it was entered the City had repealed the challenged 1983 ordinance by enactment of the 1984 ordinance. The court of appeals further found that there was no possibility that the repealed 1983 ordinance would regain vitality. *Church of Scientology Flag Service Org., Inc.* v. *City of Clearwater*, 777 F.2d 598, 605 & n.21 (11th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1986).[3]

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[3] The court of appeals' decision vacating the district court's decision as to the 1983 ordinance as moot was, in turn, effectively overruled by this Court's decision in *Northwestern Florida Chapter of Assoc. Gen'l Contractors* v. *City of Jacksonville*, ___ U.S. ___, 113 S. Ct. 2297, 2301

5. The Church then filed a petition for attorneys' fees under 42 U.S.C. § 1988. The Church contended that the elimination of the limited membership exemption, which had exempted virtually all other organized religions except the Church of Scientology, the correction of the prior restraint aspects of the 1983 ordinance, and the modification of the provision that had given the City unbridled discretion in initiating investigation and prosecution, made it the prevailing party on significant issues in the case (R5-108, R-109, R-117).

The district court denied the petition on the basis that the Church was not the prevailing party. The district court based this finding in part on the fact that the court of appeals had found the district court's decision invalidating the ordinance to be moot when entered (18a, 20a-21a).[4] It also focused on what it termed the "similarity" between the Church's legal arguments against the new and different provision in the 1984 ordinance requiring disclosure to members of financial information, and the argument the Church had made against the now-repealed limited membership exception (30a). Quoting a mischaracterization of the Church's argument *by the City*, the district court incorrectly suggested that the Church had contended "that in dispositive respects the new Ordinance was the same or even worse than the old one" (23a).[5] Notwithstanding the fact that

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(1993). *See Church of Scientology Flag Services Org.* v. *City of Clearwater*, 2 F.3d 1514, 1520 (11th Cir. 1993).

[4] The district court's reliance on the court of appeal's vacation of the district court's earlier order as moot was contrary to well-established law that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980). It is enough that the plaintiff is the "catalyst" for remedial modification of the state actions challenged. *Fields* v. *City of Tarpon Springs*, 721 F.2d 318, 321 (11th Cir. 1983); *Taylor* v. *City of Fort Lauderdale*, 810 F.2d 1551, 1560 (11th Cir. 1987). Petitioners, in apparent recognition of the catalyst theory, made no attempt in the court of appeals to justify the district court's decision denying fees on the grounds of the mootness decision, and have not sought certiorari on that basis.

[5] The quoted passage is *not* the Church's statement at all, but, rather, was a mischaracterization of the Church's argument *by the City*. The City continues to mischaracterize and misquote the Church's argument in this Court (Pet. at 2).

the district court formerly had declared the 1983 ordinance facially invalid on the basis of the very defects that the City remedied by amending the ordinance, the court now concluded that the elimination of the limited membership exemption and the limitation of the City Attorney's broad investigative and prosecutorial discretion were legally insignificant.

6. The court of appeals reversed and remanded for determination of the fee award. It held that the Church was the prevailing party because it had caused the City to amend the 1983 ordinance to eliminate the constitutionally objectionable limited membership exemption, the prior restraint of solicitation, and the City Attorney's unfettered investigative and prosecutorial discretion (1a). It ruled that the Church had prevailed on "its asserted right not to be treated differently from other religious organizations" (6a). The court of appeals said that the "gravamen of [the Church's] challenge" was that the ordinance regulated "in a discriminatory manner that favors one religion over another" (*id.*); the Church's rights were "plainly vindicated by the repeal of the challenged limited membership exemption, an action which Clearwater conceded at the time was caused by Scientology's articulation of alleged constitutional infirmities" (7a). The court of appeals also found that the Church successfully had prevailed in its challenge to the ordinance's vagueness. It concluded that the Church materially had altered the legal relationship between itself and the City in a manner that conferred legal benefit on the Church (*id.*). It also rejected the district court's reasoning that the similarity in the grounds advanced in the challenges to the 1983 and 1984 ordinances disentitled the Church to a fee award: "Scientology did not fail when Clearwater ceased some of its challenged discriminatory conduct merely because the city persisted in other challenged conduct" (7a).

Facts

Respondent is a church of the Scientology religion that provides religious training and services in Clearwater, Florida. The Internal Revenue Service has recognized respondent as a church, within the meaning of 26 U.S.C. § 170, exempt from

taxation under 26 U.S.C. § 501(c)(3). See Internal Revenue Service, *Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986*, Publication 78 (rev. 2-94), Supp. No. 1994-1. All of its religious activities in the City of Clearwater are directed towards its members. It makes no attempt to solicit contributions from the public, but it does advertise and sell religious books and pamphlets about the religion of Scientology to the public (R1-1-2 to 3).[6]

Petitioner has made a series of highly inflammatory, misleading, false—and ultimately irrelevant—statements of "fact," which it is respondent's obligation to clarify. Rule 15.1, Rules of the Supreme Court; *see also* Rule 14.5.

Thus, petitioners' statement that respondent "solicits from the public in Clearwater" (Pet. at 6-7) is false, except to the extent that the Church sells religious books and pamphlets. Similarly, petitioners' statement that "Scientology's claim to religiosity is questionable" (*id.*) is absurd, given the IRS' recognition of the respondent as a tax-exempt church, and the opinions of both courts below.

Petitioners' characterization of the Church's "use of expensive, harassing litigation" is based upon Clearwater's own self-justifying reports and accounts, and is false. Its references to amounts allegedly spent on lawyers, blast-resistant vaults, and other matters appear nowhere in the record of this case, and are misleading in the extreme, as well as being irrelevant.

Petitioners' statement that the Church made "huge pretrial litigation expenditures" requiring the City "to bring the case to a head by a summary judgment motion" (Pet. at 12) is made of

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[6] Petitioners thus distort the record in arguing that "Scientology solicits from the public in Clearwater" (Pet. at 7), and in arguing that the Church's challenge to the limited membership exemption was based upon a theory that the City could not distinguish between a church's solicitations of its own members and a church's solicitations from the general public (*id.*). Rather, as set forth *ante*, the Church's challenge to the limited membership exemption of the 1983 ordinance was premised on the facial discrimination between kinds of church members, *i.e.*, those who regularly attend and participate in church services and those who do not. As noted, Scientology religious services are typically not congregational in nature, and do not occur on a "regular" basis, a fact well-known to the drafters of the 1983 ordinance.

whole cloth. The only proceedings in *this* case were the Church's motion for preliminary and permanent injunction, made at the very outset of the case, the City's appeal from the district court's order granting that motion, and the attorney's fee motion and appeal. Petitioners' references to "litigation a outrance" (Pet. at 12) are without basis.

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner Has Not Raised A Substantial Question Of Law Or Shown A Conflict Among the Circuits As To The Proper Standard To Be Applied In Determining Whether A Party Is A Prevailing Party Entitled To A Fee Award Under 42 U.S.C. § 1988.

A. Certiorari Is Not Appropriate To Review A Circuit Court's Application Of The Correct Legal Standards To The Facts And Circumstances Of A Particular Case

The legal standards governing the award of attorney fees to a prevailing party in cases arising under 42 U.S.C. § 1983 are well-settled. *Texas State Teachers Ass'n* v. *Garland Independent School District, 489 U.S. 782, 789 (1989); Hensley* v. *Eckerhart*, 461 U.S. 424, 433 (1983). Indeed, petitioners have raised no question about the standard applicable to determination of whether a party has prevailed within the meaning of the statute. Nor do petitioners argue that the court of appeals articulated an improper legal standard at variance with that established by this Court or applied by the other circuits. The only question petitioners raise is whether the court of appeals properly applied the agreed upon legal standard to the facts and circumstances of this case.

While we submit, and show below, that the court of appeals unquestionably reached the correct result in holding that the Church was the prevailing party and is entitled to some fee award, whether it did or did not is not an appropriate subject for review by this Court. The purpose of certiorari is not to review the various and sundry decisions of the courts of appeals to determine whether they correctly weighed the record

in each case; rather, it is to ensure that they apply the correct legal principles on questions of substantial importance, and to resolve conflicts among the circuits on substantial legal issues. Rule 10.1, Rules of the Supreme Court. *E.g.*, *Ross* v. *Moffitt*, 417 U.S. 600, 616-17 (1974) (Rehnquist, J.) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"); *cf.*, *McElroy* v. *United States*, 455 U.S. 642, 643 (1982) (O'Connor, J.) (certiorari granted due to "a conflict among the Circuits on this issue of statutory construction"); *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 373 (1981) (Marshall, J.) (certiorari granted "to resolve a conflict among the Circuits"); *Marks* v. *United States*, 430 U.S. 188, 189 (1977) (Powell, J.) (certiorari granted "to resolve a conflict in the Circuits"). If the courts of appeals articulate and apply the correct legal standard, as the court of appeals indisputably did in this case, then there can be no reason for this Court to undertake review, at least absent an extraordinary misapplication of the legal standard the effect of which is virtually to create a new legal standard at variance with established law. *See*, *e.g.*, *Texas* v. *Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.); *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923) (Taft, C.J.) (certiorari jurisdiction "was not conferred on this Court merely to give the defeated party in the Circuit Court of Appeals another hearing"); *cf.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (Holmes, J.) ("We do not grant a certiorari to review evidence and discuss specific facts"). No such showing has been or could be made here.

The above principles apply with special force in the context of this case. Applications for attorneys' fees in civil rights and other litigation are fairly common. Litigation over such questions in effect amounts to litigation about the prior litigation. The docket of the Court would soon be swamped if the Court were to consider, let along undertake to review, whether the lower federal courts correctly applied the undisputed legal standards to the facts and circumstances of each case. The petition should be denied.

B. The Court Of Appeals Applied The Proper Legal Standard And Correctly Found That The Church Was A Prevailing Party And Was Entitled To A Fee Award of Some Kind

The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988, 90 Stat. 2641, provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[7]

The threshold question in the determination of whether a litigant is entitled to attorneys' fees under § 1988 is whether the applicant is the prevailing party. As the Court unanimously has held, the test is whether plaintiffs "succeed on any significant issue in the litigation which achieves some of the benefit [that they] sought in bringing the suit." *Texas State Teachers Ass'n*, 489 U.S. at 789 (*quoting Hensley*, 461 U.S. at 433). What is required is that the party requesting fees be able to show "some benefit," in other words, the plaintiff "at a minimum . . . must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant." *Texas Teachers Ass'n*, 489 U.S. at 792 (*citing Rhodes* v. *Stewart*, 488 U.S. 1, 3-4 (1988); *Hewitt* v. *Helms*, 482 U.S. 755, 760-61 (1987)). Where the plaintiff has met this minimal success, it "has crossed the threshold to a fee award of some kind." *Texas State Teachers*, 489 U.S. at 792.

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[7] The quoted passage contains the relevant language of the statute in force when the Church made its attorneys' fee request. Subsequently, in 1991, Congress recast the existing portions of § 1988 into subsections (a), (b), and (c), with the effect that subsection (b) now contains the attorney's fee provision. Pub. L. 102-166, § 113(a). It also added authorization for attorneys' fees under 42 U.S.C. § 1981a to the list of actions in the new subsection (b). Id. § 103. In 1993, proceedings under the Religious Freedom Restoration Act were added to the list in subsection (b). Pub. L. 103-141, § 4(a), 107 Stat. 1488.

A plaintiff is deemed a prevailing party and ordinarily is entitled to "some kind" of attorneys' fees award if the plaintiff has succeeded on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing the suit." *Hensley*, 461 U.S. at 433. In the Court's words, it is sufficient for the plaintiff to "be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant. . . . The touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas State Teachers*, 489 U.S. at 792-93.

There can be no question but that the court of appeals explicitly applied the standard of *Hensley* and *Texas State Teachers* in holding that the Church was a prevailing party in this litigation (5a-7a). Petitioners do not claim to the contrary.

Moreover, the court of appeals was indubitably correct in reaching its conclusion. It cannot be controverted that the City repealed the 1983 ordinance in the face of the Church's legal challenge to its constitutionality. As discussed above, the City acknowledged in writing that the amendments were made "in response to many of the objections asserted by the plaintiffs in their pretrial memoranda of law" and in recognition of the City's "responsibility to draft the ordinance narrowly to achieve its purpose" (R1-20-2). A week after the repeal, the City's counsel explained to the district court why it changed the ordinance after litigation: "[W]e took a look at why [the Church] didn't like it and we said, well, maybe they have got some valid objections to it . . . . In other words, they wanted the Court to strike down those provisions. We have given them what they asked for" (R2-46-3 to 4).

In the present Petition, the City seems to have forgotten what it told the district court. The City allows only that it had "amended certain provisions of the law" in order "to accommodate points made by Scientology" in the litigation (Pet. at 6).[8] But even this concession demonstrates lack of dispute over

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[8] The City further claims that it "accommodated" the Church "just as the City accommodated other groups in other ways when doing so would not harm the law's ability to accomplish its purposes" (Pet. at 7). This ignores the obvious difference between the Church and "other

the fact that the limited membership exemption was eliminated, the prior restraint of all solicitation without a permit was abolished, the unbridled discretion of the City Attorney to investigate and prosecute was limited, and other corrective changes were made in the ordinance, all in response to the Church's lawsuit. Moreover, the provisions that the City eliminated were precisely those that the Church claimed had unconstitutionally singled out Scientology for worse treatment than other organized religions in Clearwater. As the court of appeals noted in an earlier appeal of this case, the City's amendment "ma[de] substantial modification to Ordinance No. 3091-83." *Church of Scientology Flag Service Org. Inc.* v. *City of Clearwater*, 777 F.2d 598, 601 (11th Cir. 1985).

By eliminating the limited membership exemption, and making the ordinance more applicable to all religious and charitable organizations operating in Clearwater, the Church achieved a significant victory that is neither technical nor *de minimis*, but is at the heart of the First Amendment. No principle is more well-established under the religion clauses of the First Amendment than that the state may not "pass laws which aid one religion" or that "prefer one religion over another." *Everson* v. *Board of Education*, 330 U.S. 1, 15 (1947); *see also Larson* v. *Valente*, 456 U.S. 228, 244 (1982); *Zorach* v. *Clauson*, 343 U.S. 306, 314 (1952).

Larson is particularly instructive. In that case, the Court reviewed a solicitation ordinance containing a membership exemption which had the effect of imposing regulatory authority upon smaller and less well-established churches, exempting the more established churches. The Court found that the ordinance "impose[s] the registration and reporting requirements . . . on some religious organizations but not on others" and "does not operate even-handedly," 456 U.S. at 253, thereby "set[ting] up" a type of "official denominational preference," *id.* at 255. The Court struck down the ordinance, stating that

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groups"—the others were "accommodated" before enactment of the ordinance, since the ordinance was designed to regulate the Church of Scientology. The City's so-called "accommodation" of the Church did not take place until after the filing of a lawsuit, and the briefing and argument of the issue of the ordinance's validity.

the "constitutional prohibition of denominational preference is inextricably connected with the continuing vitality of the Free Exercise Clause." *Id.* at 245. Such laws, in the Court's words, " 'engender a risk of politicizing religion'—a risk, indeed, that has already been substantially realized." *Id.* at 253 (*quoting Walz* v. *Tax Commission*, 397 U.S. 664 (1970)). The Court found that the burden of complying with the charitable solicitation ordinance "is certainly not *de minimis*." 456 U.S. at 253. Thus, the elimination of a similar provision in the present case, catalyzed by the Church's lawsuit, must also be viewed as a significant legal victory. Not only did the Church void an invidious "badge of second-class citizenship" inherent in any such discriminatory scheme, *Daniel* v. *Paul*, 395 U.S. 298, 308 (1969) (Douglas, J., concurring), which "engender[ed] a risk of politicizing religion," *Larson*, 456 U.S. at 253, but it also eliminated a facial basis upon which enforcement officials could seek to justify harsher enforcement action against the Church than against other traditional churches. No longer could the City Attorney support investigations of the Church's solicitations of its members, but not of the local Catholic, Baptist, or Presbyterian Church, on the grounds of the statute itself.

The elimination of the prior restraint provisions of the ordinance was also of fundamental significance. Prior restraints are the most highly disfavored tools of government regulation of speech. *E.g.*, *National Socialist Party* v. *Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 561 (1976); *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Freedman* v. *Maryland*, 380 U.S. 51, 57 (1965); *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963); *Staub* v. *Baxley*, 355 U.S. 313, 325 (1958); *Kunz* v. *New York*, 340 U.S. 290, 294 (1948); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940); *Near* v. *Minnesota*, 283 U.S. 697, 713-20 (1931). Under the 1983 ordinance, a church or other organization was forbidden to engage in solicitation of any kind unless and until it obtained a permit to do so. If a permit were administratively denied, the organization would be prohibited from solicitation unless and until it obtained judicial relief from the city clerk's permit denial (R1-1-45 to 46). Under the amended 1984 ordinance, solicitation may continue without a permit unless and

until the permit is denied *and* the City obtains a court order upholding the denial. The Church thus obtained a critical and fundamental modification in the ordinance.

Similarly, the imposition of limits on the City Attorney's formerly unbridled investigative and prosecutorial powers also was a significant legal victory. Explicit legal standards which limit state discretion are an indispensable deterrent to religious discrimination. *E.g.*, *Cantwell*, 310 U.S. at 307 ("[T]o condition the solicitation of aid for the perpetuation of religious views or systems upon a license the grant of which rests in the exercise of a determination by a state authority . . . is to lay a forbidden burden upon the exercise of liberty protected by the constitution").

Where litigation has forced an adversary to make concessions favorable to the plaintiff, that plaintiff has prevailed for purposes of the § 1988 fee award. When § 1988 was enacted, Congress expressly stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights . . . without formally obtaining relief." S. Rep. No. 1011, 94th Cong., 2d Sess., at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912. As the Court has observed, "Nothing in the language of § 1988 conditions the . . . power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Maher* v. *Gagne*, 448 U.S. 122, 129 (1980).

The City cannot find support in the fact that the district court's finding of the 1983 ordinance's unconstitutionality had been vacated as moot. The court of appeals vacated that finding only because of the City's repeal of the ordinance—and the City, in turn, repealed the ordinance "in response to many of the objections asserted by the plaintiffs in their complaints and pretrial memoranda of law" (R1-20-2). In short, the court of appeals' finding of formal mootness resulted from the City's concession of the validity of many of the Church's contentions, and from the repeal of significant portions of the ordinance that the Church claimed were constitutionally objectionable.

Nor is one any less a prevailing party because success was secured on some claims and legal theories advanced, but not all. The degree of success is an issue in determining the *amount*

of the attorneys' fees to be awarded, *e.g.*, *Texas Teachers Ass'n*, 489 U.S. 782; *Hensley*, 461 U.S. 424, not *whether* attorneys' fees should be awarded in the first place. As the Court repeatedly has noted, complex civil rights litigation typically grows out of a common core of facts involving many different legal theories. A party prevails when there is success on a significant issue; typically, all theories and issues do not get decided in a party's favor—if only because some issues do not get decided at all. *E.g.*, *Texas Teachers Ass'n*, 489 U.S. at 789; *Hensley*, 461 U.S. at 435-36. It is "clear that the fact that a plaintiff has prevailed on one of two or more alternative bases for relief does not prevent an award of attorneys' fees for the unaddressed claims, as long as those claims are reasonably related to the plaintiff's ultimate success." *Smith* v. *Robinson*, 468 U.S. 992, 1007 n.10 (1984). All that is required is that "a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Texas State Teachers*, 489 U.S. at 792 (*quoting Hewitt* v. *Helms*, 482 U.S. 755, 760 (1987)). In no circumstances can the prevailing party be penalized for failing to achieve a perfect score.

Nor does the pendency of related litigation attacking other aspects of the City of Clearwater's efforts to regulate the activities of the Church of Scientology—including the Church's challenge to what it claims are constitutional defects in the ordinance *after* the amendments spurred by the Church's initiation of the present suit—remove the Church's entitlement for the relief it has obtained so far. The relevant inquiry is the relief obtained, not the claims advanced in subsequent litigation. The law is clear that attorneys' fees are warranted under § 1988 at the point when a party has established entitlement to relief; the award of interim attorneys' fees in a civil rights case is entirely appropriate even when the same case is still underway. *E.g.*, *Hanrahan* v. *Hampton*, 446 U.S. 754 (1980). The case for the receipt of attorneys' fees while related or collateral litigation is pending is at least as strong.

In sum, although the City now quarrels over the extent of the benefits that the Church enjoyed due to these litigation–motivated "amendments" to the 1983 ordinance, it does not, and cannot, contest that it eliminated from the 1983 ordinance pro-

visions respecting the limited membership exemption, the prior restraint of religious speech, and the discretion of the City Attorney to investigate, issues over which the Church had gone to court, in response to the Church's litigation. Pet. at 6-7.[9] As the court of appeals correctly held, these successes "are neither technical nor *de minimis*" (6a). These were significant victories both for the Church and for the Constitution, rendering the Church a prevailing party under § 1988.

II. Section 1988 Makes Attorneys' Fees Awards Available to Prevailing Parties Regardless Of Their Financial Condition Or Need.

The City also seeks certiorari on the question whether § 1988 should be construed to award fees only to successful litigants who are "non-wealthy" or "impecunious." The City can point to no conflict in the circuits or with this Court on the question; indeed, the case law uniformly rejects the City's position. Moreover, an examination of the statute's language, its

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[9] The City also casts aspersions on the manner in which the Church has litigated this case, hyperbolically analogizing the present lawsuit to the Allies' assault on the Normandy coast and repeatedly making shrill references to so-called Church "gospel" to litigate "a outrance." *E.g.*, Pet. at 6, 10, 12, 24. It speaks in feverish terms of the Church's "goal" being to "decimate the law." Pet. at 12. Bled of the venom, these assertions say little more than that the case was litigated zealously. The City's reference to litigation in other states, at other times, involving other parties, to support the notion that the Church's supposed character defects somehow render it undeserving of attorneys' fees, is also irrelevant. As a matter of law, even if every bit of this rhetoric were absolutely true, such conduct would not constitute "special circumstances" rendering an award of counsel fees unjust. *See, e.g., Williams* v. *Tri-County Growers, Inc.*, 747 F.2d 121, 138 n.38 (3d Cir. 1984) (attorney's misconduct not a special circumstance justifying reduction of attorney's fees); *Hall* v. *Hall*, 738 F.2d 718 (6th Cir. 1984) (plaintiff's misconduct not a special circumstance); *Mendoza* v. *Blum*, 560 F. Supp. 284, 288 n.3 (S.D.N.Y. 1983) (failure to appear for deposition not a special circumstance). Here, however, notwithstanding the petition's rancorous tone, the record is devoid of any supportable allegation or finding of misconduct. Quite simply, the Church litigated its challenge to the ordinance appropriately and vigorously, and brought it to an expeditious conclusion. The ordinance was repealed, and the case was effectively over within three months.

legislative history, and sound principles of statutory construction compels rejection of the City's argument. Congress intended that the Act encourage vigorous litigation in pursuit of important constitutional rights and federal policies, and that attorneys' fee awards should be available to all parties, regardless of identity or solvency.

A. Certiorari Should Be Denied Because The Opinion Of The Court Of Appeals Is Consistent With The Decisions Of This Court And Of Every Circuit Court That Has Addressed The Issue

Petitioners do not even attempt to show that the opinion of the court of appeals conflicts with decisions of other circuits and of this Court. The reason for this failure is obvious: every court to have addressed the issue has found that § 1988 does not limit fee awards to only "impecunious" plaintiffs. Thus, in *Blanchard* v. *Bergeron*, 489 U.S. 87 (1989), the Court stated that "a plaintiff's recovery will not be reduced by what he must pay counsel. Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of this provision [§ 1988]." *Id.* at 94.

At least seven circuits, some on several occasions, have held that a plaintiff's wealth or ability to pay for a lawyer is not bar to an award of fees under § 1988. *See, e.g., Milwe* v. *Cavuoto*, 653 F.2d 80, 83 (2d Cir. 1981); *Int'l Oceanic Enterprises* v. *Menton*, 614 F.2d 502, 503 (5th Cir. 1980); *Bunn* v. *Central Realty of Louisiana*, 592 F.2d 891, 892 (5th Cir. 1979); *Entertainment Concepts, Inc.* v. *Maciejewski*, 631 F.2d 497, 507 (7th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981); *McLean* v. *Arkansas Bd. of Educ.*, 723 F.2d 45 (8th Cir. 1983) (*per curiam*); *Ackerly Communications* v. *City of Salem*, 752 F.2d 1394, 1397 (9th Cir. 1985), *cert. denied*, 472 U.S. 1028 (1986); *Jones* v. *Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), *aff'd*, 480 U.S. 926 (1987); *Duncan* v. *Poythress*, 777 F.2d 1508, 1511 (11th Cir. 1985) (*en banc*) (*dicta*), *cert. denied*, 475 U.S. 1129 (1986); *Mitten* v. *Muscogee County School District*, 877 F.2d 932 (11th Cir. 1989), *cert. denied*, 493 U.S. 1072 (1990). No circuit has held to the contrary.

Several other court of appeals panels, and of course this Court, have analogously held that the existence of a contingency fee arrangement likewise is no bar to the award of fees under § 1988. *Blanchard* v. *Bergeron*, 489 U.S. 87 (1989); *Hammer* v. *Rios*, 769 F.2d 1404, 1408 (9th Cir. 1985); *Cooper* v. *Singer*, 689 F.2d 929, 932 (10th Cir. 1982), *on rehearing*, 719 F.2d 1496 (10th Cir. 1983); *Martin* v. *Heckler*, 773 F.2d 1145, 1152 (11th Cir. 1985) (*en banc*).

The decision of the court of appeals thus is consistent with every pronouncement and holding in this Court and in the circuit courts. No conflict appears. Certiorari should be denied.

B. Congress Did Not And Did Not Intend To Limit Fee Awards To "Impecunious" Parties

Section 1988 plainly directs the district court "in its discretion" to award the prevailing party "a reasonable attorney's fee." The court's discretion, however, is in fact quite constrained; a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Blanchard*, 489 U.S. at 89 n.1 (*quoting Hensley*, 461 U.S. at 429; *Newman* v. *Piggie Park Enterprises*, Inc., 390 U.S. 400, 402 (1968)). Nowhere in the language of the Attorneys Fees Act of 1976 is there any indication that the statute is intended to condition authorization of attorneys' fees awards upon the prevailing party's financial status or ability to afford or pay for counsel.

1. If The Statute Were Intended To Award Fees Only To The Impecunious, It Would Have Said So

The City's invitation to engraft onto § 1988 terms which Congress did not enact would be entirely inappropriate. An examination of congressional enactments both before and after the 1976 Attorneys Fees Act leaves no doubt that, if Congress had intended to make § 1988 fee awards contingent on financial need, it would have so stated.

For example, less than a decade earlier, Congress enacted a fee-shifting provision as part of the Fair Housing Act of 1968 (Title VIII to the Civil Rights Act of 1968), which prohibited discrimination in housing. 42 U.S.C. §§ 3601 *et seq*. The Fair

Housing Act created a private right of action for enforcement. *See* 42 U.S.C.A. § 3612 (West 1977).[10]

Under Title VIII, Congress provided for the award of attorneys' fees—but explicitly conditioned the award on the prevailing party's inability otherwise to pay:

> The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1000 punitive damages, together with court costs and reasonable attorney fees in the case of prevailing plaintiff: *Provided, that the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.*

42 U.S.C.A. § 3612(c) (West 1977) (emphasis in last clause added). Clearly, Congress is capable of enacting fee-shifting legislation so that attorneys' fees are awarded only when the prevailing party is (in the City's words) "impecunious" or "non–wealthy," when it chooses to. Eight years before the enactment of § 1988, Congress did precisely that.

Furthermore, four years *after* the 1976 Attorneys Fees Act, Congress again enacted a fee-shifting statute that tied entitlement to attorneys' fees to the prevailing plaintiff's financial status. In the Equal Access to Justice Act of 1980 (the "EAJA"), Congress established detailed provisions explicitly stating that an individual prevailing party would *not* be entitled to fees and costs if his or her net worth is more than $1,000,000, nor would a corporation be able to recover fees if its assets totalled more than $5,000,000 and it employed more than 500 people. *See* 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B).[11]

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[10] The private enforcement provision originally was codified at § 3612. As discussed below, subsequent recodification redesignated the relevant section as § 3613.

[11] In 1985, Congress raised the net-worth ceilings to $2,000,000 and $7,000,000, respectively. Pub. L. 99-80, §§ 1 & 2, 99 Stat. 183. It is also worth noting that Congress gave charitable and religious organizations a preferred position in the EAJA. The EAJA exempts from the $7,000,000 limitation all tax-exempt organizations under 26 U.S.C.

Thus, within twelve years, Congress enacted three significant statutes governing fee-shifting in cases that involve civil rights violations. The 1976 Act, which has *no* language making the award of attorneys' fees a matter of financial means, is bracketed historically by the other two congressional enactments, which specifically state that fee awards are contingent on the prevailing party's finances.[12] It is reasonable to infer from the presence of means tests in the 1968 and 1980 enactments, and from the absence of such language in the 1976 Act, that, had Congress intended to tie § 1988 fee awards to the plaintiff's financial circumstances, it would have done so, and, further, that if Congress did not attach such a stipulation to the language of § 1988, it is because it did not intend it to be there.

Any remaining doubt about this dissolves when one examines what Congress did to the Fair Housing Act's fee-shifting provision *after* the enactment of the 1976 Attorneys Fees Act. In 1988, Congress enacted the Fair Housing Amendments Act, Pub. L. 100-430. Congress eliminated the financial need test,

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§ 501(c)(3), and it now specifically brings under its coverage adjudications under the Religious Freedom Restoration Act of 1993. (Congress also amended § 1988 specifically to authorize attorneys' fees in proceedings under the Religious Freedom Restoration Act. *See* Pub. L. 103-141, § 4(a), 107 Stat. 1488.)

[12] Congress enacted the EAJA with the 1976 Attorneys Fees Act clearly in mind. Congress surveyed the standards governing the operation of fee-shifting statutes. It specifically referred to the civil rights fee-shifting provisions of § 1988, 42 U.S.C § 2000a-3 (Title II), 42 U.S.C. § 2000e-5(k) (Title VII), 18 U.S.C. § 2520 (Title III), 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act), and 42 U.S.C. § 1973l(e) (Voting Rights Act), and also the attorneys' fees sections of the Consumer Product Safety Act, *e.g.*, 15 U.S.C. §§ 2060(c) & (e), 2072(a), and 2073. Of the civil rights statutes, *only* Title VIII conditioned the award of attorneys' fees on the plaintiff's ability to afford legal assistance. See H.R. Rep. No. 1418, 96th Cong., 2d Sess., at 8 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4987. (The Consumer Product Safety Act did impose jurisdictional minima on the amount in controversy, but did not specifically peg the attorney's fee award to the plaintiff's financial status.) As discussed below, Congress later amended Title VIII specifically to remove its financial need test and bring it into line with other civil rights fee-shifting provisions.

and modelled the relevant amendment upon the language of § 1988, nearly verbatim:

> In a civil action under subsection (a) of this section, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee and costs.

42 U.S.C. § 3613(c)(2). *Compare* § 1988.

The language of § 1988 was used to signal that attorneys' fees awards no longer depend on the plaintiff's finances. Congress explicitly said that one of the purposes in enacting the 1988 Fair Housing Amendments Act was to "bring[ ] attorney's fee language in Title VIII closer to the model used in other civil rights laws."[13] H.R. Rep. 711, 100th Cong., 2d Sess., at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2174. When Congress criticized the 1968 Fair Housing Act's restriction of awards to only those plaintiffs who could not afford to pay, it did so by contrasting the language of the old provision with the language of § 1988:

> Unlike other civil rights laws, attorneys fees [under Title VIII] are available to a prevailing plaintiff only if the plaintiff cannot afford to pay. *"Compare" Civil Rights Attorney's Fees Act, 42 U.S.C. 1988.*

H.R. Rep. No. 711 at 16 n.20, 1988 U.S.C.C.A.N. at 2177 n.20 (quotation marks in original; emphasis added). Congress explained that the abandonment of the needs test "[p]rovides a definition of a prevailing party to be used under [The Fair Housing] Act. The term makes clear that the same definition of prevailing party as is used in [§ 1988] is to be used in this Act." *Id.* at 23, 1988 U.S.C.C.A.N. at 2184.

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[13] As noted above in connection with Congress' consideration of other attorneys' fees statutes in 1980, the Fair Housing Act was the only civil rights-related fee-shifting provision to make the fee award contingent on the prevailing party's financial ability to pay counsel. See H.R. Rep. 1418 at 8, 1980 U.S.C.C.A.N. at 4986; *compare* 42 U.S.C.A. § 3612(c) (West 1977) *with* 42 U.S.C. § 1988; 42 U.S.C. § 2000a-3; 42 U.S.C. § 2000e-5(k); 18 U.S.C. § 2520; 5 U.S.C. § 552(a)(4)(E); 42 U.S.C. § 19731(e).

From this it is clear beyond peradventure that the language of § 1988 would have stipulated that attorneys' fees awards go only to the impecunious, if that was its intended purpose. Congress did not insert a financial means qualification into the language of § 1988 precisely because it did not intend § 1988 to have such a qualification.

2. To Construe § 1988 As Imposing A Requirement Of "Impecuniousness" Would Pose Serious And Difficult Questions Of Line-Drawing Best Left To Congress, Would Expand Litigation Over Fees To An Unmanageable Level, And, As Applied To Churches And Other Charitable Organizations, Would Threaten Unwarranted Intrusion Into The Affairs Of Prevailing Plaintiffs

Petitioners' request that this Court engraft an "impecuniousness" requirement onto § 1988 would throw the federal courts into a mare's nest of litigation wholly collateral to the underlying questions of the initial lawsuits.

In the first instance, the courts would have to determine on their own what level of "impecuniousness" was required for a plaintiff to qualify for a fee award. Such line-drawing is quintessentially a legislative function best left to Congress. As we have seen, Congress did draw such lines in enacting the Equal Access to Justice Act; it determined not to do so with § 1988 precisely because no "impecuniousness" requirement was created for the latter statute.

Second, even if it were appropriate for the judiciary to legislate a definition of impecuniousness, application of that definition would be highly burdensome to the federal courts. Were the courts to embark upon wide-ranging inquisitions into the financial affairs of prevailing plaintiffs, they would be drawn into a thicket of endless fact-finding that would dwarf the determination of the amount of a reasonable counsel's fee. Indeed, the attorney's fee phase of the civil rights case would become the main event—an inquiry into the finances, income, expenditures, and spending habits of the prevailing party. It would demand the court's assessment of the reasonableness and

necessity of the party's purchases, and a scrutiny of the party's relationship with donors and vendors to determine whether its balance sheet reflects the true state of affairs, or is distorted by collusive transfers of money or assets. The courts would find themselves spending more time on ancillary attorney's fee proceedings than on deciding the merits.

Third, application of an "impecuniousness" requirement would pose serious questions of improper intrusion into the internal and financial affairs of those churches, charitable organizations, and political associations which may be civil rights plaintiffs. Not only would the courts be required to determine the financial status of such entities, but presumably losing defendants would be permitted to conduct discovery into such matters. At least with respect to churches, "it is not only the conclusions that may reached . . . which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions." *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979).[14]

It presumably was for these reasons that Congress, in establishing financial criteria for a plaintiff to recover a fee award under EAJA, specifically excluded organizations that are tax-exempt under § 501(c)(3) of the Internal Revenue Code from the limitation. *See* 5 U.S.C. § 504(b)(1)(B). Congress made the conscious decision to shield charitable and religious organizations from judicial inquiry into their finances, even when attorneys' fees are otherwise conditioned on the prevailing plaintiff's financial health.

This congressional policy is both practically and constitutionally sound, and it independently demonstrates why the imposition and definition of any "impecuniousness" require-

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[14] Indeed, *Catholic Bishop* is quite instructive. In that case, the court construed the National Labor Relations Act as not applying to the employment relationship between church-run schools and their lay employees, despite the absence of any specific language in the statute providing for such an exemption. The court so construed the statute precisely to avoid the serious constitutional question that would have been posed if the statute were deemed to apply. Here, petitioners seek to engraft, from whole cloth, a limitation upon § 1988 which, if accepted, would impose the same constitutional problems as those lurking in *Catholic Bishop*.

ment upon § 1988 should be left to Congress. To deal with the meddlesome inquiries that a financial means test entails would severely invade the operations of churches and charities, and detract from their missions. Of course, when directed toward to religious groups, such inquiries into internal affairs would offend the well-established principle of separation of church and state, as well. *E.g.*, *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Presbyterian Church*, 393 U.S. 440 (1969). Congress wisely sought to avoid these problems when it exempted § 501(c)(3) organizations from the net-worth ceiling test of the EAJA.

The financial means test proposed by the petitioners here also should be rejected. As discussed above, it would be an inappropriate usurpation of the legislative function for the Court to attach terms and conditions to § 1988 that Congress did not intend. Moreover, the course proposed by the City would thrust the courts into an area which Congress has an unmistakable and specific policy of avoiding. The courts should abide by that policy, which is consistent with well-settled constitutional principles, and decline the City's invitation to hold that § 1988 should be based on the prevailing party's finances or net worth.

C. This Court Has Consistently Refused To Base Entitlement To Civil Rights Fee Awards On The Plaintiff's Ability To Pay For Counsel

It is well-settled that the identity of the private litigant or the litigant's attorney simply makes no difference when it comes to awarding attorneys' fees to civil rights plaintiffs. For example, the Court has held that a § 1988 fee award should be made according to the prevailing market rates, regardless of whether the plaintiff was represented by a private attorney or by the Legal Aid Society. *Blum* v. *Stenson*, 465 U.S. 886, 895 (1984). "[W]e draw no distinction between profit and nonprofit law offices." *Id.* at 901, n.18.

More recently, in *Blanchard* v. *Bergeron*, 489 U.S. 87 (1989), this Court unanimously held that a prevailing plaintiff's

arrangement to pay for legal services by a contingent-fee agreement should not be used to limit a court's estimate of the reasonable counsel fees that can be awarded under § 1988. Reversing a district court disposition that had reduced a $7,500 award under § 1988 to $4,000 based on the terms of the attorney's forty percent contingent-fee arrangement, the Court held that a private fee arrangement, standing alone, cannot impose an automatic limitation on the exercise of the judge's discretion to award a fee. If the contingent agreement provides less than what the court calculated to be the reasonable fee, "[t]he plaintiff should be required to pay the higher amount." 489 U.S. at 93.

> As we understood § 1988's provision for allowing a "reasonable attorney's fee," it contemplates reasonable compensation, in light of all the circumstances, for the time and effort expended by the attorney for the prevailing plaintiff, no more and no less.

489 U.S. at 93.

Thus, the prevailing plaintiff's ability to provide for some or all of the legal services rendered should not disentitle the plaintiff to the full award of the attorneys' fees that the district court should find reasonable. In unambiguous language that applies with equal force to the present Petition, the Court explained:

> Thus it is that a plaintiff's recovery will not be reduced by what he must pay counsel. *Plaintiffs who can afford to hire their own lawyers, as well as impecunious litigants, may take advantage of this provision [§ 1988].* And where there are lawyers or organizations that will take a plaintiff's case without compensation, that fact does not bar the award of a reasonable fee. All of this is consistent with and reflects our decisions in cases involving court-awarded attorney's fees.

489 U.S. at 94 (emphasis added).

Thus, like Congress, the Court[15] has declared in the clearest language that fees under § 1988 are available to the solvent as well as the impecunious. As the Court put it succinctly, "we have not accepted the contention that fee awards in § 1988 damages cases should be modeled upon the contingent-fee arrangements used in personal injury cases." *Id.* at 96.

D. Congress Enacted § 1988 To Make Fee Awards Broadly Available To All Prevailing Parties, Regardless Of Identity Or Wealth

It would be anomalous indeed now to construe § 1988 as benefitting only the destitute, cutting off all other litigants. Applying a financial means test to prevailing parties would violate the spirit of § 1988, which is to make it easier for litigants in *all* walks of life to file civil rights claims.

Congress enacted § 1988 to encourage the initiation of suits that vindicate public rights. It had "determined that 'the public as a whole has an interest in the vindication of the rights conferred the statutes enumerated in § 1988, over and above the civil rights remedy to a particular plaintiff.' " *Riverside* v. *Rivera*, 477 U.S. 561, 574 (1986) (*quoting Hensley*, 461 U.S. 424 at 444) (Brennan, J., concurring in part and dissenting in part)). Since Congress recognized that the public good that results from such cases goes far beyond the immediate material relief that the individual litigant may recover, it made the decision that attorneys' fee awards should be provided. "Congress has elected to encourage meritorious civil rights claims because of the benefits of such litigation for the named plaintiff and for society at large, irrespective of whether the action seeks monetary damages." *Blanchard*, 489 U.S. at 96.

The attorneys' fees provision was to serve two functions: to encourage private litigants to initiate suits against unconsti-

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[15] The *Blanchard* decision was written by Justice White and joined by seven other justices. Justice Scalia concurred in all respects but one—he took exception to the extent to which the Court relied for its analysis on *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (1978), and on other lower court decisions that had been cited in the legislative history of § 1988. It would seem that all nine justices in *Blanchard* unanimously agreed with the portions of the decision quoted here.

tutional conduct, and to serve as deterrent to government entities and officials engaging in such unlawful conduct. Congress declared that "fees are an integral part of the remedy necessary to achieve compliance with our statutory policies." S. Rep. No. 1011 at 3, 1976 U.S.C.C.A.N. at 5910; *see also id.* at 5, 1976 U.S.C.C.A.N. at 5913 ("fee awards are an integral part of the remedies necessary to obtain . . . compliance"). It was Congress' view that without the provision of attorneys fees awards in civil rights litigation, "the grant of Federal jurisdiction is but an empty gesture." *Id.* at 3, 1976 U.S.C.C.A.N. at 5910 (*quoting Hall* v. *Cole*, 412 U.S. 1 (1973)). The legislative history of § 1988 makes it plain that Congress intended the remedy to be ordinarily awarded to prevailing plaintiffs. The fee award is the rule, not the exception. The award of fees to the private civil rights plaintiff is indispensable to the ability to function fully "not for himself alone but also as a 'private attorney general' vindicating a policy that Congress considered on the highest priority." S. Rep. No. 1011 at 3, 1976 U.S.C.C.A.N. at 5910 (*quoting Newman* v. *Piggie Park Enterprises, Inc.*, 309 U.S. 400, 402 (1968)).

"Section 1988 makes no distinction between actions for damages and suits for equitable relief." *Blanchard*, 489 U.S. at 95. It is not the purpose of § 1988 to reward only those private plaintiffs who have reaped a financially munificent recovery. "The intention of Congress was to encourage successful civil rights litigation, not to create a special incentive to prove damages and shortchange efforts to seek effective injunctive or declaratory relief." *Id.* The quantum of relief, measured in pecuniary or material terms, is not determinative of entitlement to attorneys' fees. Congress designed § 1988 fully recognizing that constitutional relief normally cannot be measured in pecuniary terms. Frequently, even resounding victories bring no financial relief, or just token relief. In many cases in which § 1988 fees are available, the law "severely limit[s] the damage remedy." *Riverside*, 477 U.S. at 577.

> Because damage awards do not reflect fully the public benefit advanced by civil rights litigation, Congress did not intend for fees in civil rights cases, unlike most private law cases, to depend on obtaining substantial

> monetary relief. . . . Thus, Congress recognized that reasonable attorney's fees under § 1988 are not conditioned upon and need not be proportionate to an award of money damages.

Id., 477 U.S. at 576.

Just as it would be inappropriate to view § 1988 as a system of financial commissions tied to the purely economic value of a civil rights victory, it also would be entirely inconsistent with the statute's language or purpose to view it merely as need-based program of financial aid, distributing attorneys' fees to indigent litigants while leaving solvent litigants to shift for themselves. Congress designed § 1988 to close loopholes and "gaps" that had remained in the federal scheme of civil rights statutes; the goal was to make it more likely, rather than less likely, for an aggrieved plaintiff to bring a meritorious constitutional challenge. S. Rep. No. 1011 at 4, 1976 U.S.C.C.A.N. at 5910. The purpose of § 1988 was not limited to subsidizing the poor; it was to make the availability of relief and attorneys' fees as comprehensive as possible. Nothing in the legislative history suggests that attorneys' fee awards should be based on whether an attorney has been litigating on a pro bono basis. Instead, they were intended to be based on the open market: "In computing the fee, counsel for prevailing parties should be paid, as is traditional with attorneys compensated by a fee-paying client, 'for all the time reasonably expended on a matter.' " S. Rep. No. 1011 at 6, 1976 U.S.C.C.A.N. at 5913.

Since Congress did not intend to limit the availability of § 1988 attorneys' fees to indigent or impecunious plaintiffs, the Court should reject the petitioners' suggestion to amend the statute by judicially grafting on a means test. Section 1988 attorneys' fees are available to all litigants—including churches of all ages, sizes, rites, and conditions of solvency.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: July 11, 1994

Respectfully submitted,

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APPENDIX

Opinion and Order of the United States District Court for the Middle District of Florida on Application for A Preliminary Injunction Enjoining Enforcement of Ordinance No. 3091-83

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CHURCH OF SCIENTOLOGY FLAG SERVICE ORG., INC.

Plaintiff(s),

vs. CASE NO. 84-96-CIV-T-17

CITY OF CLEARWATER, et. al.,

Defendant(s).

and

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, et. al.,

Plaintiff(s),

CASE NO. 84-97-CIV-T-17

vs.

CITY OF CLEARWATER, FLORIDA, et. al.,

Defendant(s).

MEMORANDUM OPINION AND ORDER

This cause is before the Court on complaints seeking declaratory and injunctive relief challenging the enforcement of Clearwater Ordinance

Number 3091-83 (see Appendix 1), enacted by the Clearwater City Commission on October 6, 1983.

The City of Clearwater is a municipality of the State of Florida. Ordinance 3091-83 was passed on October 6, 1983, and did not go into force until January 31, 1984. On January 27, 1984, the parties entered into a stipulation by which they agreed the ordinance would not be enforced during the pendency of the instant litigation.

One should always be careful when attempting to summarize an ordinance or statute. In brief, the Clearwater ordinance seeks to regulate the solicitation practices of charitable organizations within Clearwater by requiring a registration statement be filed with the City Clerk by the

charitable organization seeking to solicit funds. The ordinance also requires the charitable organizations which solicit funds to maintain records and documents necessary to complete a registration statement and the City Attorney is given the authority to investigate charitable organizations which solicit funds if complaints are received from ten or more individuals.

On January 20, 1984, Americans United for Separation of Church and State; National Council of the Churches of Christ in the U.S.A.; The American Jewish Committee; Suncoast American Baptist Church; Joyce Parr, individually and as Moderator of the Suncoast American Baptist Church; and James A. Christison, individually, and as Treasurer of the Suncoast American Baptist Church, filed a

complaint seeking injuncitive (sic) relief against the City of Clearwater; Mayor of the City of Clearwater; City Manager of the City of Clearwater; City Clerk of the City of Clearwater; and City Attorney of the City of Clearwater (case 84-97-CIV-T-17).

On January 23, 1984, the Church of Scientology Flag Service Organization, Inc. filed a complaint seeking injunctive relief against the City of Clearwater; the City Attorney of the City of Clearwater; and the City Clerk of the City of Clearwater (Case 84-96-CIV-T17).

For the purpose of reviewing the facial validity of the city ordinance, these cases were joined, and on March 9, 1984, the Court heard oral arguments. At the end of their presentations, the Court instructed counsel that they were to

provide any post-hearing memorandum of law to the Court by March 16, 1984, as the Court intended to rule on the facial validity of the ordinance by the end of March 1984. On March 15, 1984, the Clearwater City Commission passed an amended ordinance which incorporated some of the arguments Plaintiffs' counsel presented to the Court on March 9, 1984.

Despite the fact that the City of Clearwater has amended their ordinance, the Court feels that it has jurisdiction to consider the facial validity of Ordinance Number 3091-83 as presented in the complaints and argued by counsel March 9, 1984. The reason is quite simple: to decide otherwise would encourage a municipality to enact laws which apparently affect the constitutional rights of its citizens and upon

those laws being legally challenged, to then amend them and effectively prolong the period of time during which citizens are unsure of their constitutional rights.

Another reason the Court feels that it should rule on this question is because of the large number of cases pending, and needing, the Court's time. This Court must let parties have their day in court but will not permit them to have someone else's day. In short, the Court does not intend for cases to go on forever. There reaches a point of decision in all cases, and for Ordinance Number 3091-83, that point of decision is here.

The Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 and

§ 1343(a)(3) and the Doctrine of Pendent Jurisdiction. Venue is proper pursuant to 28 U.S.C. § 1391(b).

A cursory reading of Ordinance 3091-83 should indicate even to a layman that the ordinance impacts upon First Amendment freedoms. We read a great deal about the First Amendment and often one wonders if we fully consider the simplicity, yet majesty of the phrases our forefathers put together to establish the freedoms which make the United States the most unique country on earth.

The First Amendment of the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacebly to assemble, and to petition the government for a redress of grievances.

There are a few fundamental principles regarding the establishment and free exercise of religion clauses of the First Amendment:

All persons must be free to practice their faith without governmental intrusion or regulation. If government does seek to regulate, and the regulation impacts on religious practice, the governmental regulation must be in the furtherance of a compelling state interest and the government regulation must be the least restrictive means necessary to further that compelling state interest. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

The government, in pursuing its legitimate, secular purposes, must avoid administrative entanglement with religious institutions. Walz v. Tax

Commission of the City of New York, 397 U.S. 664 (1970); Lemon v. Kurtzman, 403 U.S. 602 (1971).

The government must avoid associations favoring or opposing religion in general or specific religions in particular whether such discrimination is intentional or de facto. Abington School District v. Schempp, 374 U.S. 203 (1963) Larson v. Valente, 456 U.S. 228 (1982).

The government may not evaluate the benefits of religious practice including the truth or falsity of statements about the benefits of religious practices under any circumstances. United States v. Ballard, 322 U.S. 78 (1944); Founding Church of Scientology v. United States, 409 F.2d 1146 (D.C. Cir. 1969).

Laws enacted to regulate public solicitations by religious, political, and social organizations often impact on the religious guarantees of the First Amendment together with the freedom of speech and association protections in that amendment. Several principles have been developed to judge such laws.

Public solicitation is a protected activity under the First Amendment because, as a practical matter, fund raising is necessary for a church or association to survive and because it is an effective method of reaching the audience or membership to "get the word out". Cantwell v. Connecticut, 310 U.S. 296 (1940); Fernandes v. Limmer, 663 F.2d 619 (5 Cir. 1981).

There are areas in which the state may have an important interest in regulating solicitation activities of the public. The state or municipality has a legitimate interest in seeking to avoid disturbances of the peace and insuring public safety, and therefore, certain time, place, and method restraints can be placed on solicitation activities. Courts have also recognized that a state or municipality has an interest in prohibiting "fraud" in solicitations. In this regard, a municipality may regulate to insure that funds raised actually find their way to the organization for which the solicitation was given. Cantwell v. Connecticut, 310 U.S. 296, 306 (1940).

The regulatory authority (ie. government) may not attempt to regulate the content of the representations made to induce contributions on the basis that the representations falsely state spiritual, emotional, or other benefits which may accrue to the contributor in this world or the next. **United States v. Ballard,** 322 U.S. 78 (1944).

As is the case with most statutes which impact upon First Amendment freedoms, any regulation of public solicitation must be by the least restrictive means necessary to further the compelling state interests. **Fernandes v. Limmer,** 663 F.2d 619 (5 Cir. 1981). No discretion must be left to the administrative and enforcement officials as to the scope or breath [sic] of the regulation **Hynes v. Mayor and Council of**

the Borough or Oradell, 425 U.S. 610 (1976); Village of Schaumberg (sic) v. Citizens for a Better Environment, 444 U.S. 620 (1980).

Regulations concerning solicitations must be limited to those solicitations of the public in public places. International Society of Kirshna (sic) Consciousness of Houston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5 Cir. 1982). Regulation of solicitations on the premises of a church or political association is not necessary because that activity could not disturb the public; there is not a danger of misrepresentation in this solicitations, by the organization for which contributins were sought. See City of Houston supra, at 562.

Any regulation of public solicitations must not effect a prior restraint upon such activities. Prompt and adequate judicial review procedures including appeal must be available to insure that decisions made by administrators do not effectively forestall First Amendment activities which should be allowed. **Fernandes v. Limmer**, supra at 628.

The state may not pass laws which aid one religion or which prefer one religion over another. This principle of neutrality among religions requires the court to examine this ordinance on its face to determine whether it will have a discriminatory or unequal effect upon different religious groups or practices by exempting some churches or religious organizations, and, subjecting others to

regulations or burdens. **Epperson v. Arkansas**, 393 U.S. 97 (1968); and **Larson v. Valente**, 456 U.S. 228 (1982).

If the Court finds such a result, i.e., discrimination, the legislation must be struck down unless the discriminatory features are necessary to further a compelling state interest and unless there exists no less restrictive means to accomplish the state interest without imposing disparate burdens upon religious groups **Larson v. Valente**, supra, at 244-255.

In **Larson** the Supreme Court found that an ordinance which created a disparate impact upon smaller religious groups and exempted more established churches, could not be justified by a compelling interest. The court went on to find that the ordinance imposed

registration and reporting requirements on some religious organizations, but not on others; this non-evenhanded operation created an indication of official denominational preference.

Clearwater Ordinance 3091-83 exempts those churches which limit their solicitations to those who regularly attend or participate in religious services (Section 100.01(5)). Churches which obtain contributions from members who participate in church services on a non-regular or episodic basis, as well as churches which do not offer, encourage, or require regular attendance or regular participation of their members are <u>not</u> exempt. Thus, a stable church membership requiring regular attendance need not be affected by this ordinance; however, a church whose membership is growing and

actively engaged in proselytizing and fund raising falls under the regulatory scheme of this ordinance.

How can a church whose congregation or group of members is growing, ever, at any given time, indicate to civil authority the number of "members" it has in regular attendance or as participants in the organization?

If a drunk were to stagger into a church and "be saved" and then indicate an intention to dedicate his life to its purposes through regular attendance at that church, would he be a "member"?

There is absolutely no showing of any compelling state interest being furthered by the parameters of the limited membership exemption of this ordinance. This ordinance not only impies a religious preference, its mere

presence could foster a stagnation of religious practice in Clearwater by impacting on growing congregations and forestalling larger, more organized churches from continuing to seek new members as well.

The Defendant has indicated, during oral argument, that the Clearwater ordinance was modeled after a recent ordinance in the City of Houston and therefore this ordinance should be upheld upon the authority of International Society for Krishna Consciusness of Ouston, Inc. v. City of Houston, Texas, 689 F.2d 541 (5 Cir. 1982). The Court finds there is no safe harbor for Clearwater in the City of Houston as the Houston ordinance did not license the discriminatory power in administrative officials plus the investigatory and

enforcing powers which the Clearwater ordinance encompasses. In fact, the Houston ordinance did not grant the power to officials charged with enforcing the solicitation ordinance to conduct investigations, compel disclosure, and prosecute organizations who must register. The Firth Circuit recognized and emphasized Houston's amendment of their ordinance was critical in that Court's decision upholding the ordinance, as the amended ordinance eliminated language allowing enforcing officials in Houston to "make such investigation as he may deem necessary to ascertain the truth of the facts and information set out" in the registration statement.

In Clearwater's ordinance, the City Attorney is granted broad investigatory powers to investigate violations of the

prohibited acts section of the ordinance (see Section 100.06, 100.05(a)(b), 100.05(1)(a), 100.05(1)(c), 100.05(1)(g). The Clearwater ordinance does precisely what the Fifth Circuit emphasized the Houston ordinance did not.

The enforcement provisions of the ordinance do not contain articulated standards indicating when the City Attorney should or will investigate an organization against which ten complaints have been filed. This vagueness in determining when the City Attorney will conduct an investigation when ten complaints have been filed against an organization creates an opportunity for arbitrary and subjective enforcement of a law infringing on constitutional rights and accordingly, it is unconstitutional. Grayned v. City of Rockford, 408 U.S. 104

(1972); **Baggett v. Bullitt**, 377 U.S. 360 (1964); **Kolender v. Lawson**, ___ U.S. ___, 75 L.Ed.2d 903 (1983) (involving a criminal statute).

At oral argument counsel for Americans United described the ordinance as one in which "a shot gun was used to shoot a mouse". This Court would not state that analogy as a test for constitutionality; however, the Court is compelled, upon review of Clearwater Ordinance 3091-83 to declare the ordinance unconstitutional as it will impact upon smaller churches with growing or changing congregations, requiring smaller churches to be subjected to regulation while exempting more established congregations, thereby violating the principle of neutrality without a compelling state interset.

Further, the Court finds that the instant ordinance is quite different than that addressed by the Fifth Circuit in the City of Houston.

Accordingly, the Court declares Clearwater City Ordinance Number 3091-83 unconstitutional and permanently enjoins its application or enforcement.

Case 84-97 is hereby dismissed and Case 84-96 is hereby dismissed as to Counts Two through Twelve of the complaint; the Clerk is directed to enter judgments for the respective Plaintiffs against Defendants. Jurisdiction is retained for the enforcement of the executory provisions herein.

DONE AND ORDERED in Chambers, in Tampa, Florida, this 28th day of March, 1984.

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies furnished to:
All Counsel of Record